

**Rule 13, Ariz. R. Crim. P.**

**INDICTMENT AND INFORMATION – Duplicitousness: A charge is not duplicitous if it merely lists alternate ways in which the same crime can be committed  
.....Revised 11/2009**

A duplicitous indictment is one that charges two or more distinct and separate offenses in a single count. However, a single count charging a single, unitary crime is not duplicitous merely because it charges alternate ways of violating the same statute, and a defendant is **not** entitled to a unanimous verdict on the precise manner in which the crime was committed. In *State v. Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982), the defendant was indicted on a single count of murder, with the indictment reciting that the murder was both premeditated murder and felony murder. The jury was given only two verdict forms for the murder offense – one for guilty of first degree murder and one for not guilty of first degree murder. The defendant was convicted and appealed, arguing that he was denied his right to a unanimous jury verdict because some jurors could have found him guilty of premeditated murder while others could have found him guilty of felony murder. Therefore, he contended, he would be convicted of first degree murder without any unanimous verdict on what kind of first degree murder he committed.

The Arizona Supreme Court agreed that the scenario the defendant described could have occurred, but found that even if it did, the defendant was not denied any right. In Arizona, first degree murder is only one crime, regardless of whether it occurs as a premeditated murder or a felony murder. The Court stated:

Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, *State v. Counterman*, 8 Ariz. App. 526, 448 P.2d 96 (1968), the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.

*State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982); accord, *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993); *State v. Gerlaugh*, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982); *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982).

In Arizona, kidnapping, like first degree murder, is only one crime, although it may be committed in different ways. In *State v. Herrera*, 176 Ariz. 9, 859 P.2d 119 (1993), a defendant was charged with kidnapping a police officer, either with the intent to inflict physical injury or with intent to interfere with his governmental function. The jury found the defendant guilty. On appeal, the defendant argued that he was denied his right to a unanimous jury because the jurors might not have reached a unanimous decision as to the intent with which the defendant committed the kidnapping. The Court found no error because kidnapping is a unitary offense – that is, it is only one crime. Citing *Encinas*, *supra*, the Court held that the defendant was properly convicted of kidnapping by a unanimous jury verdict. *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993). Contrast *State v. Sanders*, 205 Ariz. 208, 218, ¶ 44, 68 P.3d 434, 444 (App. 2003) [holding that assault in violation of A.R.S. § 13-1203 is not a “unitary offense,” but rather describes “offenses with distinctly different elements.”]

See also *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990), in which the Arizona Supreme Court, citing *State v. O'Brien*, 123 Ariz. 578, 583, 601 P.2d 341,

346 (App. 1979)<sup>1</sup>, found that an instruction that tracked the statutory language of A.R.S. § 13-604 in defining alternate ways a jury could reach a finding of dangerousness was not duplicitous.

Moreover, an indictment that charges a defendant with violation of a statute constituting a “unitary crime” need not specify the precise means by which the defendant violated the statute. See *State v. Fisher*, 21 Ariz. App. 604, 605, 522 P.2d 560, 561 (1974). In *Fisher*, the defendant moved for a directed verdict, claiming that the information did not correctly allege the specific means by which he violated the statute. The trial court denied the motion for directed verdict, and the Arizona Court of Appeals affirmed the trial court’s decision. The Court emphasized that its “reading of the information indicates that it was couched in terms broad enough to indicate to the defendant that he was being charged with a violation of the statute. It is not fatal that it did not particularize by which one of the three methods the infraction did occur.” *Id.*

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<sup>1</sup> In *O’Brien*, the defendant was indicted on fraud offenses. The statute in question required sellers to sign and disclose certain documents and retain executed copies. Each count charged the defendant with both failing to sign and disclose a document and with failing to retain a copy. He argued that the counts were duplicitous because they charged two alternate ways of violating the same statute. The Court of Appeals disagreed, reasoning that the statute’s objective was to require disclosure. Failure to retain a copy was not a separate offense – it was “merely an added responsibility designed to ensure and confirm performance of the principal objective.” *O’Brien, id.*